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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948**

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**No. 75** 75

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ELMER UVEGES,

*Petitioner,*

*vs.*

COMMONWEALTH OF PENNSYLVANIA, STANLEY P. ASHE, WARDEN, WESTERN STATE PENITENTIARY,

*Respondent*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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## BRIEF FOR THE PETITIONER

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ALBERT A. FIOK,
*Counsel for Petitioner.*

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*Respondent.*

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## BRIEF FOR THE PETITIONER

---

### Opinion Below

1. The Supreme Court of Pennsylvania did not file an opinion.

2. The Superior Court of Pennsylvania filed an opinion (R. 18), reported in 161 Pa. Super. Ct. 58, 53 A. 2d 894.

### Jurisdiction

Petitioner contends that his confinement in the Western State Penitentiary is a deprivation of liberty without due process of law in violation of the Fourteenth Amendment of the Constitution. The Supreme Court of Pennsylvania is the highest Court of the Commonwealth in which a decision could be had. Its final order on the petition for a writ of

habeas corpus was entered on September 29, 1947 (R. 21). Petitioner's motion for leave to proceed *in forma pauperis* and his petition for certiorari were filed in December 1, 1947, and granted June 7, 1948 (R. 45). The jurisdiction of this Court is based upon Section 237 (b) of the Judicial Code as amended by the Act of June 25, 1948.

## Question Presented

Whether the action of the Pennsylvania authorities in holding petitioner incommunicado for almost two weeks between his arrest and trial, a long term of imprisonment on indictments illegally prepared, without benefit of counsel or explanation of the charges against him, met the fundamental standards of fairness and decency imposed by the Fourteenth Amendment of the United States Constitution.

## Statement of the Case

On October 4, 1938, the petitioner, then a boy seventeen years of age, was arrested by a member of the Pittsburgh, Pennsylvania police ostensibly for the purpose of questioning and investigation. During the ensuing period of almost two weeks, he, with another young boy, was shunted from one police station to another and to the Allegheny County Detective Bureau without an opportunity to contact his family or friends. He was finally committed to Allegheny County Jail, and, two days before the date of sentencing, he was called before an Assistant District Attorney for an interview. At this interview he made known his desire to have representation and advice of counsel before committing himself to any arrangement concerning his plea. The answer was a threat that if the Commonwealth was put to the expense of a trial, a sentence of not less than twenty years was certain to follow; but if the Petitioner should agree to plead guilty, the court would be persuaded to commit him

to Huntingdon Reformatory because of his youth, where a parole might be earned within two years. With no one to advise him, completely ignorant of his rights, scared and bewildered, and relying upon the representations of the Assistant District Attorney, the Petitioner, along with the other youth, verbally agreed to enter a plea of guilty to one charge of burglary.

The District Attorney prepared nine District Attorney's "indictments" under the Act of April 15, 1907, P. L. 62, 19 P. S. Sec. 241, without presentation to the grand jury. None was signed by the District Attorney as required under the Act of May 3, 1850, P. L. 654, 16 P. S. Sec. 3431, and the Act of March 31, 1860, P. L. 427, 19 P. S. Sec. 262. A plea of guilty was rubber stamped on each indictment but none was signed by the Petitioner as required under the interpretation of the Act of April 15, 1907, P. L. 62, in effect at that time. None was shown to Petitioner at any time.

On October 27, 1938, the Petitioner, along with another youth of the same age, appeared before the court. Although the record does not indicate, Petitioner was asked by the prosecuting official if his plea was guilty, to which he answered, "yes." Although apparent that he was not represented by counsel, the court made no inquiry as to whether the Petitioner desired counsel to represent him, or whether he understood the consequences of his plea. Without the indictments being read to him, the court proceeded to sentence him on four District Attorney's "indictments", charging burglary and receiving stolen goods from five to ten years on each bill of indictment, the same to run consecutively from October 15, 1938, for a total of twenty to forty years. Sentence on the other indictments was suspended.

On October 1, 1946, Petitioner filed an application for a writ of *habeas corpus* (R. 4-6) in the Court of Common Pleas of Allegheny County in which he described the foregoing events somewhat inexpertly. On January 20, 1947,

in an opinion and order the writ was denied (R. 7-8). On February 11, 1947, the District Attorney filed an answer (R. 9-10), a copy of which was not served to Petitioner, in which the contentions of the Petitioner were in substance either admitted or not denied. On February 1, 1947, an appeal to the Superior Court of Pennsylvania was filed and the opinion affirming the court below was filed July 17, 1947. On August 22, 1947, petition for allowance of appeal to the Supreme Court of Pennsylvania was filed (R. 15-21), and on September 29, 1947, the petition was denied (R. 21). Upon filing a petition for writ of certiorari, this Court granted Petitioner's motion for leave to proceed *in forma pauperis* and allowed the writ of certiorari on June 7, 1948 (R. 45).

Although *habeas corpus* may not be used as a substitute for an appeal, it is the proper remedy under Pennsylvania law for attacking a sentence passed in violation of fundamental constitutional rights. *Commonwealth ex rel. Schultz* v. *Smith*, 139 Pa. Super. 357; *Commonwealth ex rel. Penland* v. *Ashe*, 341 Pa. 337; *Commonwealth ex rel. McGlinn* v. *Smith*, 344 Pa. 41. From the beginning to the present, there is no suggestion that the petition was procedurally deficient in the instant case. The conclusion is inescapable, therefore, that the Supreme Court of Pennsylvania ruled on the Federal question raised by the application for *habeas corpus*. The petition for certiorari, therefore, brings Petitioner's claim properly before the Court.

## Specification of Errors to Be Urged

The Supreme Court of Pennsylvania erred:

1. In failing to hold that under the circumstances set forth in the petition for *habeas corpus*, Petitioner was constitutionally entitled to the assignment or advice of counsel.

2. In failing to hold that under the circumstances set

forth, Petitioner was sentenced without due process of law and in violation of the Fourteenth Amendment of the United States Constitution.

3. In denying the petition for *habeas corpus*.

## Summary of Argument

Petitioner was indicted, arraigned and sentenced without due process of law. The record shows that Petitioner, on trial for serious crimes, was not given any assistance from counsel, offered the assistance of counsel, or even advised of his right to the assistance of counsel. Even the sentencing court failed in its duty to inquire whether or not Petitioner fully understood the nature of the charges against him and the full consequences of his plea. Due process of law requires a fair opportunity to answer an accusation understandingly, and when the charges are numerous and serious and the potential issues too complex for a youthful layman to comprehend, the Commonwealth must offer counsel to a defendant, not otherwise protected, at all stages of the proceeding against him. *DeMeerleer* v. *Michigan*, 329 U. S. 663; *Rice* v. *Olson*, 324 U. S. 786; *Williams* v. *Kaiser*, 323 U. S. 471; *Wade* v. *Mayo*, 334 U. S. 672.

Where a man, charged with a series of serious crimes, is shunted from police station to police station, finally lodged in jail and kept there, and is brought into court and rushed right through to sentence without benefit of counsel, he certainly does not get a fair trial. Here the charges were numerous and too complex for Petitioner as a layman to understand the different accusations, discriminate between them, appraise the possible defenses, and then reach an intelligent judgment concerning his guilt or innocence.

The District Attorney, in preparing the various indictments against Petitioner, disregarded the mandates of the statutes and judicial opinions to the detriment of the Peti-

tioner and in violations of due process. The fundamental unfairness of the proceeding was further aggravated by the action of the prosecuting officials in holding Petitioner unlawfully, without opportunity of seeking advice or to contact his family or friends, and without bringing him before a magistrate for almost two weeks, the entrapment resorted to by the Assistant District Attorney in obtaining a plea, and the subsequent misinformation presented to the sentencing judge. The bewilderment and despair engendered by this mistreatment would have destroyed whatever opportunity he might otherwise have had to prepare an understanding answer to the accusations against him.

The trial court, in addition to the failure to assure Petitioner the substance of a hearing and the failure to instruct him in his constitutional rights, permitted the multiple application of one plea of guilty to the remaining indictments although such procedure denies the defendant any information as to what the indictments charge. The use of such blanket plea is illegal and a deprivation of due process of law.

For these reasons, the conviction and sentence are, therefore, void.

## ARGUMENT

### I

**Petitioner was indicted, arraigned and sentenced without due process of law.**

With the possible exception of *DeMeerleer* v. *Michigan*, 329 U. S. 663, counsel's study of the authorities has revealed no case in this Court which more clearly comes within the principles enunciated in *Powell* v. *Alabama*, 287 U. S. 45, than does the instant case. Here is a seventeen year old youth, wholly ignorant of his rights and of criminal procedure, faced with a series of complicated and seri-

ous crimes and involving complex legal issues, without counsel and the opportunity of even consulting with relatives or friends, influenced and entrapped by the representations of a zealous law enforcement officer, and pushed to conviction without a single word uttered in his behalf. The conviction on a "plea" of guilty was virtually put into the mouth of this seventeen year old ignorant youth.

What kind of a hearing is it wherein there is a failure to inform this ignorant youth, without counsel, of any of the rights which are the essence of a hearing? The due process of law which the Fourteenth Amendment secures to every person charged with a crime requires this Court, when its jurisdiction is properly invoked, to review the whole course of state proceedings to see if any "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" has been violated. The most important among them is the right to "the substance of a hearing." *Palko* v. *Connecticut*, 302 U. S. 319, 327. In all criminal proceedings a state is required to give an accused the opportunity to meet the accusations against him. A formal hearing is not sufficient; the opportunity to answer must be real. Moreover, in reviewing a conviction alleged to result from denial of this fundamental right, this Court will not confine itself to the judicial proceeding but will scrutinize the prior conduct of state authorities in dealing with the Petitioner to ascertain whether it vitiated a proceeding which was formally correct. *Frank* v. *Mangum*, 237 U. S. 309, 327; *Smith* v. *O'Grady*, 312 U. S. 329; *Mooney* v. *Holohan*, 294 U. S. 103; *Carter* v. *Illinois*, 329 U. S. 173, 175.

The principle that every person charged with a crime has a constitutional right to the substance of a hearing has been never seriously questioned and has found numerous applications in the decisions of the Court. *Frank* v. *Mangum*, 237 U. S. 309, 327; *Moore* v. *Dempsey*, 261 U. S. 86;

*Powell* v. *Alabama*, 287 U. S. 45; *Mooney* v. *Holohan*, 294 U. S. 103; *Smith* v. *O'Grady*, 312 U. S. 329; *DeMeerleer* v. *Michigan*, 329 U. S. 663; *Townsend* v. *Burke*, 334 U. S. 736.

The procedural niceties of a hearing are a sham when the accused cannot meet the charges because he cannot comprehend them or intelligently manage his defense. Consequently the canons of decency and fairness which are essential to due process impose uniformly upon states the duty to take whatever measures are necessary under the circumstances of each particular case to insure that the accused understands the charge and has a fair opportunity, through one means or another, to intelligently prepare and present his answer. Thus, for example, courts have uniformly aided an accused in obtaining witnesses to establish his defense or supplying interpreters in those cases where such are necessary for a full understanding of the proceedings. These are paid for by the state in order to guarantee the essentials of a hearing without regard to the ability of the accused to pay for them. By the same reasoning, an explanation of the meaning of the accusations, of the ingredients of the offenses and the defenses potentially available may be equally indispensable. Courts generally consider such indispensable in charging a jury, and if a jury of laymen require such explanation, it follows that the very individual on trial should be afforded the same explanation. Here, a seventeen year old youth was placed on trial and if the courts considered it important to advise a jury prior to its deliberation concerning the guilt or innocence of an accused, how much more important is it for a judge to advise the accused who is on trial. Thus, the Court has held that when a serious crime is charged and the defendant is incapable of conducting his own defense, due process is not satisfied by anything less than the assignment of counsel. *Powell* v. *Alabama*, *supra*; *Rice* v. *Olson*, 324 U. S. 786; *DeMeerleer* v. *Michigan*, *supra*; *Wade* v. *Mayo*, 334 U. S.

672. And this need may exist whether the accused stands trial or pleads guilty. *Williams* v. *Kaiser*, 323 U. S. 471; *Rice* v. *Olson, supra; Foster* v. *Illinois*, 332 U. S. 134.

The personal qualifications of the accused, his age and education, the seriousness of the charge, and the complexity of the potential issues are material and determining circumstances. Summarizing its early decisions, the Court said, in *White* v. *Ragen*, 324 U. S. 760, 763:

> "We have many times repeated that not only does due process require that a defendant on trial upon a serious criminal charge and unable to defend himself shall have the benefit of counsel . . ."

The Court, in other decisions, suggests that in appropriate cases, the state may refrain from offering the assignment of counsel and delegate to the trial judge the responsibility of safeguarding the interests of the accused by giving him the legal advice and assistance necessary to a fair hearing. *Betts* v. *Brady*, 316 U. S. 455, 470-472; *Foster* v. *Illinois, supra*. Even though the Fourteenth Amendment does not establish a rigid procedure binding the states to offer counsel in all cases, its guarantee of due process of law requires a state, by one appropriate means or another, to give every person charged with crime whatever guidance is necessary for a fair opportunity to answer the accusations. Nothing less meets the bare requirements of the substance of a hearing. And where it is clear that neither procedure is followed, it cannot be said that due process of law has been complied with.

When this Petitioner was "arraigned," these essential safeguards were omitted. He was called upon to plead to nine indictments charging serious offenses. The number of charges, the nice distinctions and the legal verbiage would bewilder any layman let alone a youth seventeen years old;

it also appears that there were several defenses, the potential availability of which only learned counsel would appreciate. When the Petitioner was required to answer these charges, alone and unaided, he had been unlawfully shut off from advice and assistance and subjected to the psychological pressures of being held incommunicado. In court, he was not advised of his right to engage counsel, nor was he instructed on the particular offenses which the indictments charged. He was not even advised as to the consequences that a plea of guilty might entail.

The Petitioner's claim, therefore, does not rest upon the sole ground that because the record is devoid of any offer of counsel upon his plea of guilty, he was denied due process of law. The fundamental unfairness which vitiates the sentence under which he is held resulted from the concurrence of four different and distinct factors: (A.) the legality of the indictments; (B.) the complexity of the accusations; (C.) the misconduct of public officials; and (D.) the seeming indifference of the trial court towards Petitioner's rights.

### A. The Indictments Were Illegal and Void

Nine indictments were prepared in this case by the District Attorney under the apparent authority of the Act of April 15, 1907, P. L. 62, 19 P. S. Sec. 241, without presentation to the grand jury (23-40). None was signed by the District Attorney as required under the Act of May 3, 1850, P. L. 654, 16 P. S. Sec. 3431, and the Act of March 31, 1860, P. L. 427, 19 P. S. Sec. 262. On the back of each indictment (R. 23-40) the following was rubber stamped:

> "And now Oct. 27, 1938, defendant having been charged with the offense herein set forth and having notified the district attorney of willingness to enter a plea of guilty and this indictment having been there-

upon prepared defendant after reading same do plead guilty thereto which plea is entered at request.
As to each defendant."

None of these indictments was signed by the Petitioner as required under the interpretation of the Act of April 15, 1907, P. L. 62, in effect at that time. None was shown to the Petitioner at any time.

The Act of May 3, 1850, P. L. 654, 16 P. S. Sec. 3431, in speaking of the duties of the District Attorney, provides, in part, as follows:

> "The officer so elected shall sign all bills of indictment, and conduct in court all criminal and other prosecutions in the name of the commonwealth. . . ."

In all of the cases that have arisen in the Commonwealth of Pennsylvania on the question of whether or not the public prosecutor is required to sign the indictments, the courts have ruled, in effect, that the prosecutor must sign, and even if there is an omission to sign, this defect may be corrected by subsequent proceedings. In the instant case, no subsequent proceedings were taken to correct the defect complained of. That the indictments must be signed by the District Attorney has the force not only of legislative enactment but also judicial interpretation. *Commonwealth* v. *Lenox*, 3 Brewster 249. In *Commonwealth* v. *Lenox*, *supra*, the court indicated the necessity of signature by the District Attorney. In that case, the indictment was not signed by the District Attorney and defense counsel moved to quash the indictment. The District Attorney then moved the court for leave to sign and affix his name at the foot of said indictment, which was allowed and thereby overruled the motion to quash. This particular provision of the law in Pennsylvania has not been changed by any subsequent rulings of court to the knowledge of the Petitioner and his counsel. In all cases where this question has been raised,

the Pennsylvania appellate courts have resolved this question against the respondents, particularly in cases arising under the Act of April 15, 1907:

*Commonwealth ex rel. Mayernick* v. *Ashe*, 139 Pa. Superior Ct. 421, 12 A. 2d 452;
*Commonwealth ex rel. Penland* v. *Ashe*, 142 Pa. Superior Ct. 403, 17 A. 2d 224;
*Commonwealth ex rel. Slifko* v. *Ashe*, 144 Pa. Superior Ct. 593, 20 A. 2d 799;
*Commonwealth ex rel. Dende* v. *Ashe*, 144 Pa. Superior Ct. 598, 20 A. 2d 802.

In *Commonwealth ex rel. Mayernick* v. *Ashe*, *supra*, the Court said (page 422):

"..... No indictment had been found against relator but sentence was purportedly imposed under the provisions of the Act of April 15, 1907, P. L. 62, which provides that in all criminal cases except homicide, a defendant charged with the commission of a crime may enter a plea of guilty, without the presentation of a bill of indictment to a grand jury and the finding of a true bill against him. Being in derogation of the common law, its provisions must be *strictly observed*. They are:

1. The district attorney must prepare a bill of indictment in the usual form—and this means just such an indictment as he would present to a grand jury—which must be sanctioned by him (Com. ex rel. Fagan v. Francies, 53 Pa. Super. 278, 289), that is, authenticated, or signed by him." (Italics supplied.)

In *Commonwealth ex rel. Penland* v. *Ashe*, *supra*, the Court said (page 404):

"(1) In the first place the 'indictment' was not signed by the district attorney. This defect was amendable and would be considered amended if there had been

any authentication of it by the court or the clerk of court, such as was present in Com. ex rel. Krannacher *v.* Ashe, 142 Pa. Super. 162, 15 A. 2d 855. But here there was none."

And neither was there anything to correct such defect in the instant case. The Respondents, by their silence on this point, confirmed the contention of the Petitioner. It is necessary to point out that even before the decision in the case of *Commonwealth ex rel. Mayernick* v. *Ashe, supra*, the Respondents were cognizant of the procedure required under the Act of 1907, for in *Commonwealth ex rel. Krannacher* v. *Ashe, supra*, a case arising in Allegheny County about a year after the action here involved, the Respondents *did* sign the "indictment." In the above case, both the District Attorney and the Sentencing Judge knew of the procedure to be followed under the Act of 1907 and a sentence of the lower court was upheld because (a) the indictment, although not signed by the defendant, was signed and endorsed by the judge as and for the defendant, and (b) the indictment *was* signed by the District Attorney.

The Act of 1907 provides, in part, as follows:

"Whenever hereafter, within this commonwealth, any person is charged with the commission of any crime, and such person is willing to enter a plea of guilty, and shall notify the district attorney to that effect, no bill of indictment charging such offense shall be sent to a grand jury; but the district attorney shall at once prepare a bill of indictment, in the usual form, and the plea of guilty shall, at the request of said defendant or defendant's counsel be entered thereon, and the court of the proper county at any session thereof, shall thereupon, forthwith, impose sentence for the offense set forth therein: Provided, however, That nothing in this act shall be construed so as to relate to, or change the proceedings in, homicide cases in this

commonwealth: And provided further, That the defendant may withdraw his plea of guilty, at any time before sentence, by leave of the court."

This Act clearly implies that before the District Attorney can proceed by what is called a "district attorney's bill," there must be a waiver of the right to have the grand jury return a true bill and without this waiver, the subsequent acts of the District Attorney constitute a nullity. The act of the accused in waiving his constitutional right is the only procedure by which the District Attorney can proceed under the Act of 1907. Here, the Petitioner (R. 16, 20) denies having signed such waiver; the District Attorney has been unable to produce such waiver and does not contend that such waiver was, in fact, signed, and the record discloses no such waiver. All of the cases arising under the Act of 1907, with the possible exception of one, show a waiver in writing signed by the accused or his counsel.

In *Commonwealth* v. *Francies*, 53 Pa. Superior Ct., 278, 289, the Court, in construing the Act of 1907, said:

> "To hold that this provision is merely directory, and that want of compliance with it is a mere informality which is cured or waived by a premature plea of guilty, would not be warranted either by the letter or spirit of the act, and would be in contravention of general principles universally recognized as most material in the administration of punitive justice. The very case we have before us shows the confusion and uncertainty that are likely to result if it be held that the statutory safeguards may be disregarded or treated as mere technicalities and not as matters of substance. If an accused is to be deemed to have waived them, and to have consented to be sentenced to infamous punishment, such waiver and consent must be affirmative and express, and may not be rested on doubtful and uncertain inference."

And further, on page 292, it was said:

> "It is urged that the discharge of the prisoner will establish a bad precedent. We do not think so. A bad precedent cannot be established by a decision according to law, even though it may result in the party's escape from the full measure of punishment he deserves. A bad precedent would be established by holding that the provisions of the act of 1907 are directory only, and may be treated as relating to mere matters of form."

In *Commonwealth ex rel. Mayernick* v. *Ashe*, 139 Pa. Superior Ct. 421, a case arising in Allegheny County, the Court said:

> "2. The defendant's plea of guilty shall be entered thereon. It is our opinion that this means that the plea must be endorsed or entered on the 'indictment', and in view of the lack of a finding of a true bill by the grand jury, and the requirement that it be entered at defendant's request the plea should be signed by the defendant if able to do so, and if not his mark should be made in the presence and be witnessed by the clerk, or a court officer. This attests his request that the plea of guilty be so entered. These are safeguards, designed to avoid any uncertainty as to what the defendant was charged with and to what he pleaded guilty.

And going further, the Court said:

> "We are of opinion that the provisions of the act of 1907, supra, were not substantially complied with, and following the decision of this court in Com. ex rel. Fagan *v.* Francies, 53 Pa. Super, 278, and the reasons therefor so well stated by Judge Rice on pages 290-293 of 53 Pa. Super., that the sentence of the Court imposed thereon was void for want of jurisdiction under the Act."

The Respondents infer that because his alleged offenses were reported in open court and the sentence imposed there-

on were initialed by the Sentencing Judge, the Petitioner must have known the crimes wherewith he was charged. This conclusion, however, overlooks the undisputed fact that twice nothing amounts to nothing. The Petitioner, by appearing in open court, with limited education, completely bewildered and being totally unfamiliar with criminal procedure and the requirements of the Act of 1907, could not breathe legality into a void act. The initial of the sentencing judge, after sentence has been imposed, cannot cure such defect, for his initial merely authenticates the sentence actually imposed and has nothing to do with the propriety of the indictment.

B. The Charges Against Petitioner Were of Such Complexity as to Require Guidance of Counsel in Arriving at an Understanding Answer

When the Petitioner was brought before the Court of Oyer and Terminer, he was called upon and supposed to have plead to nine indictments charging him with a multitude of different crimes. The record discloses no pleas entered by the Petition (R. 41-45). He states he plead to one charge of burglary. The courts below state he plead to four indictments. The Assistant District Attorney stated that the Petitioner admitted all the various charges set forth in the informations that have been filed (R. 43), and further (R. 9) that he was indicted for crimes on which no indictments were even prepared against him (indictments Nos. 88-89-90-91 and 92). Indictment No. 81 charged the Petitioner with burglary in the first count and receiving stolen goods in the second count. Indictments Nos. 82, 83 and 84 also charged the Petitioner respectively in the first counts with burglary and in the second counts with receiving stolen goods. Indictments Nos. 85, 86, 87 and 93 charged the Petitioner with burglary. Indictment No. 741 charged the Petitioner with felonious assault. It is pertinent to

point out that Indictments Nos. 85, 87 and 93 were fatally defective in that each indictment contained several distinct charges of burglary.

The statutes under which these indictments were brought were as follows:

1. The charges of burglary were laid under the Act of 1860, March 31, P. L. 382, 18 P. S. 3041, which provides, in part, as follows:

> "If any person shall, by night, willfully and maliciously break or enter into the state capitol, or other public building belonging to the Commonwealth, or to any city or county thereof, or to any body corporate, society or association, or into any church, meeting house or dwelling house, or out house parcel of said dwelling house, with intent to kill, rob, steal, or commit a rape, or any felony whatsoever, whether the felonious intent be executed or not, the person so offending shall on conviction, be adjudged guilty of felonious burglary; . . . ."

In order to sustain a conviction under this statute, three elements must be present. The entry must be at night and willful and malicious. The entry must be in a public building or dwelling. The accused must enter with intent to commit a felony.

Under this statute, proof of entry is not sufficient; an actual or constructive breaking is a part of the offense. *Roland* v. *Commonwealth*, 82 Pa. 306; *Johnston* v. *Commonwealth*, 85 Pa. 54.

2. The charges of receiving stolen goods were laid under the Act of 1909, April 23, P. L. 159, 18 P. S. 2861, which provides, in part, as follows:

> "If any person shall buy, have, receive, within the limits of the Commonwealth of Pennsylvania, any goods, chattels, moneys or securities, or any other matter or thing, which shall have been stolen or felon-

iously taken, either in the Commonwealth of Pennsylvania or in any other state or country, knowing the same to have been stolen or feloniously taken, such persons shall be guilty of felony . . . ."

Three elements are necessary for conviction under this statute. It must be proved that the goods were actually stolen. It must be proved that the goods were actually in possession of the accused. It must be proved that the accused had knowledge that the goods were stolen. A person under this Act cannot be indicted for receiving stolen goods unless he has taken them into his possession, either actually or potentially. *Sleigh's Case*, 3 Brewster 342. Even proof of an unexecuted agreement to share in the sale of stolen goods is not sufficient to sustain conviction. *Commonwealth* v. *Light*, 195 Pa. 220. A conviction cannot be had on the uncorroborated testimony of the thief. *Commonwealth* v. *Potts*, 18 Phila. 477.

3. The charge of felonious assault was laid under the Act of 1860, March 31, P. L. 382, as amended by the Act of 1876, May 1, P. L. 92, 18 P. S. 2228, which provides, in part, as follows:

> "If any person shall . . . shoot at any person, or shall, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person . . . with intent in any of the cases aforesaid to commit the crime of murder, he shall, although no bodily injury be effected, be guilty of felony, . . . "

In order to convict under this statute, it must be proved that there was a shooting or drawing of the trigger, that the weapon was loaded and directed at some person, and the intent to commit murder.

In view of the charges and the necessary elements of each charge, an experienced criminal lawyer assigned to defend the Petitioner would certainly have inquired into the cir-

cumstances under which Petitioner was alleged to have committed these various charges. He would have first ascertained whether the elements necessary to constitute the crime were present. He would have ascertained whether or not the Petitioner was directly involved in any of the charges as outlined in the indictments and would have determined what, if any, defenses were available, based upon a careful study of the facts and of the law.

Argument is scarcely necessary to demonstrate that merely hearing these various charges read aloud, a layman could not plead intelligently to these indictments embracing many distinct offenses. Less argument is necessary to show that it would be an impossibility to plead, intelligently or otherwise, to indictments not even read to the Petitioner. He knew he was confronted with one charge of burglary, but beyond this, he was not placed in a position of distinguishing or differentiating between the various charges, even if a youth of seventeen were able to do so. He would not know and could not have known that indictments Nos. 85, 87 and 93 each charged him with several distinct crimes, that each crime contained its own peculiar ingredients, and that different defenses might be available to each. Even if it is assumed that Petitioner could have distinguished between the different indictments in entering a plea, or that he must have known that he had committed a crime, the degree of prejudice caused by the absence of counsel is left to speculation. Only counsel, after a thorough study of the relevant facts, could determine the charges to which a plea of guilty was appropriate. But, while proof of prejudice is not essential (*Williams* v. *Kaiser*, supra), it is plain from this record that there were important issues which Petitioner could not appreciate but which experienced counsel could have explored before advising him how to plead. A careful study of the evidence available suggests that experienced

counsel would have advised Petitioner to plead not guilty to most, if not all, of the various charges. (R. 41-45).

Officer Cavanaugh was called as a witness to describe part of the crimes for the judge's guidance in passing sentence.

"Officer Cavanaugh: The only thing I know, we were getting calls about a series of robberies of these houses in the Squirrel Hill District. Our district runs from Forbes Street over and the biggest part of these were supposed to have been committed on the other side of Forbes St. We got a call one night on the last house they got into on Bellrock St. and from information received located where the two defendants had been rooming on Howe St. Two days later we got a call to Scarborough and Grouse St. and when we got there we caught McKim and the other boy got away. We caught Uveges later in the vicinity of Howe St.

Mr. Langfitt: How did they get in these places?

Officer Cavanaugh: They would use a glass cutter and in this way get at the lock.

Mr. Langfitt: Was this always in the night time?

Officer: No.

Mr. Langfitt: Were the people whose homes were entered at the home when they got in?

Officer: Not generally.

Mr. Langfitt: Did you recover most of the loot?

Officer: The biggest part of it in McKim's room.

Mr. Langfitt: Over what period of time were the entries made?

Officer: Between 2 and 2½ months."

Mrs. Price was called to describe one of the burglaries.

"Mr. Langfitt: Are you one of the parties whose home was entered?

Mrs. Price: Yes.

Mr. Langfitt: Just tell what happened there.

Mrs. Price: We were sitting in the living room one evening. The windows in the rear of the house were locked and screened. We did not hear anything but

later when I went back to look for my purse, I discovered all of the drawers had been pulled out and their contents on the floor or badly mussed up. We then discovered that whoever had come in had removed the screen and opened the latch on the window in some manner. I could not find my purse and then discovered that it was gone.

Mr. Langfitt: Did you see either of the defendants?

Mrs. Price: No, but now I recognize this boy (indicating McKim) as one whom I had seen loafing around the house later in the day."

Mrs. Wilma Harris was called to describe the felonious assault.

"Mrs. Wilma Harris, 945 Flemington Ave., Pittsburgh: It was around 2:45 in the morning of Sep. 9th. I thought I heard someone coming into my bedroom. I was awake at the time and I turned my head over so slightly and asked who was there. I did not get any answer and whoever it was went back down the hall. I then asked who was there again and when I said this someone said, 'Shut up, if you don't shut up I will let you have it.' With that whoever it was shot and then my husband got up and they ran."

It is clear from the record that the testimony of these unsworn witnesses (R. 41) offered little towards the conviction of Petitioner. In this proceeding, there is no occasion to pass judgment upon the merits of the potential defenses suggested. Upon investigation, some or all might have been found to lack merit, or the facts might have suggested others. Their only importance in this case is to illustrate the inadequacies of the hearing which the Petitioner received. Thus, what was said in *Powell* v. *Alabama*, is applicable here:

"Even the intelligent and educated layman has small and some times no skill in the science of law. If charged with crime, he is incapable, generally, of determining

for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

These observations are as pertinent in connection with the accused's plea as they are in the conduct of a trial. *Williams* v. *Kaiser*, 323 U. S. 471, 475. In brief, the Petitioner rests his contentions on this phase of the case on two propositions. First, due process of law requires a state to offer counsel to those indigent defendants not otherwise protected whenever the charges are too serious and the issues too complex to permit a fair opportunity to answer without legal advice. Second, in the instant case, although Petitioner required such assistance to adequately answer the accusations with which he was confronted, the police held him incommunicado, no offer of counsel was tendered and no care for his protection taken by the court.

### C. The Misconduct of Public Officials Increased Petitioner's Need for the Assistance of Counsel

While the informations, upon which indictments were based in this case, are not a part of the record, a reference to them clearly sustain the contention of the Petitioner that improper police practices were used in connection with his detention. The Petitioner was arrested on October 4, 1938. From the date of his arrest to October 15, 1938, at

which time he was lodged in the Allegheny County Jail, he was shunted between three different police stations and the Allegheny County Detective Bureau without an opportunity afforded him to see his family or friends. Such conduct on the part of the police officials is not merely a departure from formal routine. The private or secret interrogation of arrested persons prior to indictment has become common practice and, in many cases, the foundation of harsh criticism and judicial condemnation. In Pennsylvania, the rules requiring the police to bring an arrested person promptly before a magistrate or justice of the peace, are designed to protect men against the reprehensible practice know as the "third degree" which, although universally objected to as indefensible, still find their way into use. Such serious misconduct on the part of the police is certainly relevant in determining whether, as a result of the court's failure to offer Petitioner legal assistance, an element of fundamental unfairness operated in the process which resulted in his confinement. Where the basic safeguards of criminal procedure are observed, a defendant is brought before a justice of the peace or a magistrate promptly upon his arrest; he is informed of the charges against him, given time to consider his predicament, and afforded an opportunity for consultation with family or friends. Even thereafter, a careful judge, particularly where a minor is involved, before accepting a plea, would assure himself that the defendant understood the charges, his right to a trial, and the possible consequences of a plea of guilty. Where those safeguards are observed, it is possible that the voluntary entry of a plea of guilty without request for counsel is to be taken as evidence that the accused felt no unfairness in being called upon to answer the indictments without legal advice. *Foster* v. *Illinois*, *supra*. That question, however, is not present here, for in the Petitioner's case, all those safeguards were omitted.

There has been no denial of the Petitioner's contention that at the interview held in the District Attorney's office, when request for counsel was made, instead of receiving encouragement for representation of counsel, he was threatened that if the state were put to the expense of a trial, a sentence of not less than twenty years was certain to follow. Instead of receiving encouragement, the Petitioner was tricked and entrapped into entering a plea of guilty on a charge of burglary at a time when the District Attorney was contemplating the preparation of indictments on every possible charge contained in the informations. The reason is obvious. Without some arrangement made for a guilty plea, the District Attorney was required by law to present the informations to the grand jury for any action it might care to take. This interview in the District Attorney's office may tend to show the reason for the absence of Petitioner's signatures to the pleas on the back of each indictment.

While the narrative transcript of the testimony attached to the record (R. 41-45) is strictly speaking not a part of such, it has been attached by stipulation of counsel for Petitioner to show the misleading statements of the Assistant District Attorney. Notwithstanding the fact that only nine indictments were prepared, the same Assistant District Attorney, who held out promises of leniency, stated to the court, either by design or mistake, that the Petitioner, along with another boy, was charged with sixty-seven burglaries, seven charges of violation of the Firearms Act, two charges of pointing a fire arm and one charge of felonious assault. It is impossible to state at this time to what extent the sentencing judge was motivated by such misinformation in meting out punishment of such severity upon a boy of such tender age. The Assistant District Attorney did not inform the court of the arrangement concerning the plea, but merely stated:

"The defendants admit the various charges set forth in the informations that have been filed."

There is nothing in the record to indicate that the Petitioner, by waiver or other action, gave consent to the multiple application of his one plea of guilty. However, for reasons not made clear, the Assistant District Attorney used the one plea to cover all of the indictments that were prepared in this case. So far as the record indicates, the court was not advised as to the number of charges to which the Petitioner plead guilty. Such unauthorized use of a blanket plea denies a defendant any information as to what the indictments charge and places no restriction on the number of charges the District Attorney may terminate by using a single plea as a rubber stamp. It is essential to the protection of an accused to be informed as to the precise accusation or accusations to which he is to plead and such unauthorized blanket plea gives no information whatever as to the charges against him.

It was the position of the District Attorney and the lower courts that the Petitioner plead to four indictments, although there is nothing in the record to indicate such assumption. If one were to account for the number of pleas entered by looking at the indictments themselves (R. 23-40), the only conclusion that could be reached is that the Petitioner plead to all nine indictments. However, even the District Attorney has not been willing to go so far (R. 9.)

The misinformation supplied by the District Attorney in this case would be sufficient by itself in holding that the Petitioner was not accorded due process of law, as was so aptly stated in *Townsend v. Burke*, 334 U. S. 736, 740:

"We believe that on the record before us, it is evident that this uncounseled defendant was either over-reached by the prosecution's submission of misinformation to

the court or was prejudiced by the court's own misreading of the record. Counsel, had any been present, would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted. Consequently, on this record we conclude that, while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand."

D. The Courts Omitted Measures Which Might Have Protected Petitioner Against Unfairness

It is apparent that the trial court, as well as the appellate courts, was concerned only with its belief that Petitioner was guilty and not with the due process requisite to establish criminal liability. The courts, in this case, either ignored or repudiated the very due process questions involved. Even though the trial court had knowledge that the Petitioner appeared without benefit of counsel and must have known that a minor youth was faced with complex and serious charges against him, no offer was made to furnish him with legal assistance and no attempt was made to inform the Petitioner of the seriousness of the charges against him, or took any step whatever to inform the Petitioner as to the possible consequences of his plea. The right to be represented by counsel is a fundamental right, going to the very basis of the administration of criminal law; and it places on the trial judge the onus to inform the defendant of his rights and to assist him in obtaining the benefits of those rights. Even if the Petitioner made no specific request to be represented by counsel, his ignorance of his rights in the matter, under the circumstances of this case, would be sufficient excuse for that default. A youth of seventeen years

of age would be hardly expected to be fully familiar with constitutional guarantees of which even laymen of mature intellect are ignorant. Under these circumstances, it was the duty not only of the District Attorney but the court itself to call attention to fundamental safeguards. The failure of the trial court to inform him of his rights amounts to a denial of the right. Article I, Section 9 of the Pennsylvania Constitution guarantees to accused persons in all criminal cases, the right to be heard by counsel, but such a guarantee is meaningless when an accused is not notified of his right to counsel at any stage of the proceedings. The limitation of this basic right only to those cases where such right is offered would create mockery of fundamental justice. For, as so aptly stated by the Supreme Court of Pennsylvania, in *Commonwealth* v. *O'Keefe*, 298 Pa. 169, 173, 149 A. 73:

> "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter an opportunity to acquaint himself with the facts of the case."

The failure of the court to inform the Petitioner as to his rights to counsel or to appoint counsel for him under the circumstances, was fundamental error. "Courts sit not only for the disposition of business but primarily for the dispensation of justice." *Commonwealth* v. *Valerio*, 118 Pa. Super. Ct. 34, 178, A. 509.

In *Wade* v. *Mayo*, 334 U. S. 672, 684, this Court said:

> ". . . It was also in error in assuming that the failure to appoint counsel in a non-capital case in a state court is a denial of due process under the Fourteenth Amendment only if the law of the state requires such an appointment. To the extent that there is a constitutional right to counsel in this type of case it stems directly from the Fourteenth Amendment and not state statute."

It seems to be the trend of courts in Pennsylvania and elsewhere to hold that where the legislature has provided for the appointment and pay of counsel in murder cases only, that by reason of this legislative enactment, the court is not bound to appoint counsel to represent an inexperienced young man, who is poverty-stricken and unable to employ counsel for a fair trial. This was neither the practice nor the law of Pennsylvania at the time of Petitioner's conviction. *Commonwealth ex rel. Schultz* v. *Smith*, 139 Pa. Super. Ct. 357, 11 A. 2d 656, 659. There seems no logic in the reasoning that where the state has provided for the appointment of counsel with pay in capital cases only, the legislature intended furnishing of counsel in no other felony cases. It is believed that the intention of the legislature in this particular law was to provide compensation for attorneys appointed in murder cases, rather than to limit the right of appointments to only capital cases and not other serious felonies. This conviction carries a maximum of forty years. In a case for murder in the second degree, a defendant can be sentenced to a maximum term of twenty years, considerably less than the maximum here. Who can say which man will have the first opportunity to gain his freedom? And yet, the Commonwealth is required to furnish counsel to indigent prisoners charged with murder, but not to others according to the respondent.

If counsel undertake to represent indigent persons in this Court without compensation, it is not asking too much to require state courts to ask its bar to do likewise in the interest of justice and protection of fundamental rights.

The appellate courts have taken the position in this case that a court is required to inquire whether a defendant desires counsel or offer to appoint counsel only in capital cases (R. 13). It is also stated in effect that, based on relatively recent rulings, the matters complained of were procedural defects which could be corrected.

Disregarding for the moment the obligation to appoint counsel, the fact that due process guarantees the right to counsel in criminal cases in state courts is today too well established to justify discussion.

*Powell* v. *Alabama*, 287 U. S. 45;
*Ex parte Hawke*, 321 U. S. 114;
*Williams* v. *Kaiser*, 323 U. S. 471;
*Tomkins* v. *Missouri*, 323 U. S. 485;
*House* v. *Mayo*, 324 U. S. 42;
*White* v. *Ragen*, 324 U. S. 760;
*Rice* v. *Olson*, 324 U. S. 786;
*Hawk* v. *Olson*, 326 U. S. 271;
*DeMeerleer* v. *Michigan*, 329 U. S. 663;
*Townsend* v. *Burke*, 334 U. S. 736;
*Wade* v. *Mayo*, 334 U. S. 672.

See also:

*Grosjean* v. *American Press Co.*, 297 U. S. 233, 243-244;
*Palko* v. *Connecticut*, 302 U. S. 319, 324, 327;
*Avery* v. *Alabama*, 308 U. S. 444, 445;
*Betts* v. *Brady*, 316 U. S. 455;
*Canizio* v. *New York*, 327 U. S. 82, 85;
*Johnson* v. *Zerbst*, 304 U. S. 485;
*Walker* v. *Johnston*, 312 U. S. 275, 286;
*Holiday* v. *Johnston*, 313 U. S. 342;
*Glasser* v. *United States*, 315 U. S. 60.

Further, it is now settled by the above cases that the guarantee of right to counsel includes counsel to advise on the plea and a defendant who pleads guilty is as much entitled to counsel as one who pleads not guilty.

It is also well established that counsel must be furnished in other than capital cases. *Smith* v. *O'Grady*, *supra* (robbery); *Powell* v. *Alabama*, *supra* (rape); *Rice* v. *Olson*, *supra*

(burglary); *White* v. *Ragen*, *supra* (obtaining money and goods by means of the confidence game); *Williams* v. *Kaiser*, *supra* (robbery); *Betts* v. *Brady*, *supra* (robbery); *Wade* v. *Mayo*, *supra* (breaking and entering); *Townsend* v. *Burke*, *supra* (burglary and robbery).

As was stated in *Walker* v. *Johnston*, *supra*:

> "If he did not voluntarily waive his right to counsel, or if he was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right."

While the above case was decided under the Fifth and Sixth Amendments to the Constitution of the United States, in *Smith* v. *O'Grady*, *supra*, this Court under circumstances very similar to the instant case, decided that incarceration for the charge of robbery without aid of counsel violated the due process clause of the Fourteenth Amendment. The Court, speaking through Mr. Justice Black, said:

> "These allegations, if true, undermine and invalidate the judgment upon which petitioner's imprisonment rests. The circumstances under which petitioner asserts he was entrapped and imprisoned in the penitentiary are wholly irreconcilable with the constitutional safeguards of due process. For his petition presents a picture of a defendant, without counsel, bewildered by court processes strange and unfamiliar to him, and inveigled by false statements of state law enforcement officers into entering a plea of guilty."

In *Powell* v. *Alabama*, *supra*, the Court, in discussing a hearing, said:

> "What, then, does a hearing include? Historically and in practice, in our own Country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by

counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without legal aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issues or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

In *Rice* v. *Olson, supra*, this Court said:

"Whatever inference of Waiver could be drawn from the petitioner's plea of guilty is adequately answered by the uncontroverted statement in his petition that he did not waive the right either by word or action. This denial of waiver squarely raised a question of fact. The State Supreme Court resolved this disputed fact by drawing a conclusive implication from the petitioner's plea of guilty. This is the equivalent of a holding that one who voluntarily pleads guilty without the benefit of counsel has thereby competently waived his constitutional right to counsel, even though he may have sorely needed and been unable to obtain legal aid. A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary" (page 788).

The right to counsel in criminal cases other than capital has been recognized by the Pennsylvania appellate courts in *Commonwealth* v. *Valerio*, 118 Pa. Superior Ct. 34, 178

A. 509; *Commonwealth* v. *Richards*, 111 Pa. Superior Ct. 124, 169 A. 464; *Commonwealth, ex rel. Schultz* v. *Smith*, 139 Pa. Superior Ct. 357, 11 A. 2d 656. The right to representation by counsel and the duty of the trial court to so inform the accused or the appointment of counsel in his behalf was the established law at the time of the conviction of Petitioner.

The declared interpretations of the Act of 1907, *supra*, and the Act of 1850, *supra*, should not be construed to take away a fundamental right existing at the time of Petitioner's conviction. If a statute passed by the legislature, which changes punishment, or takes away fundamental rights, can be declared to be *ex post facto*, a court, in disregarding former rulings on the same subject, and in effect overruling them in later opinions, and depriving a defendant of some lawful protection existing at the time of his conviction, or placing him to his material disadvantage, may also in effect hand down a ruling in nature of *ex post facto*. Even the decision of a judicial body should not be permitted to be retroactive if a previously existing right is destroyed thereby.

## Conclusion

Briefly, the Petitioner contends that when a defendant has been accused of crimes which he cannot comprehend sufficiently to make an intelligent response alone and unaided—when he has been subjected to all the confusion and despair engendered by unlawful confinement, shut off from friends and counsel who could come to his aid—due process of law requires a state to adopt some measure sufficient to give him a real understanding of the charges, the corresponding defenses, and the course of conduct which he may follow. He does not contend that this Court should set the rigid procedure for all states. That is for the state to

determine. The measures adopted may include an offer of counsel or, in appropriate cases, an impartial inquiry by a fair-minded judge.

The fundamental unfairness that vitiates Petitioner's conviction is the failure of the Commonwealth to adopt any measure which would assure Petitioner an opportunity to comprehend and answer the accusations. The whole course of the proceedings was calculated to rush Petitioner to the penitentiary without a real opportunity to make an understanding defense. Haste can never be used as an excuse to deprive one of fundamentals of justice and in violation of rights guaranteed by the Fourteenth Amendment. The indictments charged offenses involving nice legal distinctions to which important defenses may well have been available but as to the existence of which Petitioner, as a young layman, could hardly guess. The prosecuting officials, through indifference or overzealousness, detained him unlawfully isolated from family and friends. The court neither explained the offenses nor advised him of his constitutional rights, although he was obviously ignorant thereof primarily because of his youth. The court seemingly permitted the use of unauthorized blanket plea and gave him no opportunity to understand and answer the accusations. The appellate courts likewise either ignored or were indifferent to the constitutional rights involved. Under all the circumstances, it is plain that Petitioner did not have the substance of a hearing and was sentenced to the penitentiary without due process of law.

The Petitioner, as a humble citizen, comes into this Court, with the Constitution of his country in his hand, and respectfully asks this Court of last resort to mete out justice he has failed to get in the proceedings below.

Because the constitutional rights of the Petitioner have been deprived, because the indictments, conviction and sentence of the Petitioner were illegal and void, the judg-

ment of the Supreme Court of Pennsylvania should be reversed and, in view of the long confinement, the Petitioner discharged.

Respectfully submitted,

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